90-1104

No.

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JOSEPH F. SPANIOL, JR.
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

N.A.A.C.P., DETROIT BRANCH; THE GUARDIANS, INC. BRADY BRUENTON; CYNTHIA MARTIN; HILTON NAPOLEON; SHARRON RANDOLPH; BETTY T. ROLLAND; GRANT BATTLE; CYNTHIA CHEATOM; EVIN FOBBS; JOHN H. HAWKINS; HELEN POELNITZ, on behalf of themselves and all others similarly situated,

Petitioners,

vs.

DETROIT POLICE OFFICERS ASSOCIATION (DPOA); DAVID WATROBA, *President*; CITY OF DETROIT; COLEMAN A. YOUNG, *Mayor*; DETROIT POLICE DEPT.; BOARD OF POLICE COMMISSIONERS; WILLIAM HART, *Chief*,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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January 9, 1991

QUESTIONS PRESENTED

Petitioners are some 800 Black police officers, laid off in 1979 and 1980 by their employer, the City of Detroit Police Department. Claiming a budgetary crisis, the City chose to lay off some 1100 officers, 800 of whom were black, despite the prior findings of intentional racial discrimination in recruitment, employment and deployment, made by the district court in *Baker v. City of Detroit*, 483 F. Supp. 930 (E.D. Mich. 1979). Plaintiffs-Petitioners alleged that the black officers were impermissibly removed from their jobs, in light of the City's unmet remedial obligations flowing from the 14th Amendment violations found in *Baker*, as well as violations of 42 U.S.C. § 1983. Plaintiffs also alleged that the Detroit Police Officers' Association, the certified collective bargaining agent for the black officers, had failed its duty of fair representation and had violated Plaintiffs' rights under 42 U.S.C. § 1981.

The district court, finding a violation of Petitioners' rights under the Equal Protection Clause of the Fourteenth Amendment, ordered reinstatement of all laid off officers, both Black and White, enjoined further uniformed police layoffs without court approval, and ordered the DPOA to make changes in union procedures and policies to end the adjudicated exclusion of its black members.[1] The district court, after having referred the Plaintiffs' fee and cost application to a Magistrate for review and report, adopted substantially the Magistrate's report and awarded fees and costs to the Plaintiffs.[2]

The Court of Appeals for the Sixth Circuit initially reversed and remanded in 1987 on the liability and remedial

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[1] The 7/25/84 district court opinion on liability and remedy is reported as *NAACP v. DPOA*, 591 F. Supp. 1194 (E.D. Mich. 1984).

[2] The 10/21/85 district court opinion on fees and costs is *NAACP v. DPOA*, 629 F. Supp. 1173 (E.D. Mich. 1985), and appears in the Appendix at A.-79.

issues.[3] It also reversed the district court's award of fees and costs.[4]

On remand, the district court declared the case to be moot and dismissed it as to both the City and union defendants, on the grounds that all the officers had been rehired by the City and Blacks then constituted a majority of the union, making them capable of protecting themselves through union democracy.[5]

On the issue of fees, the district court found that Plaintiffs had been the catalysts which produced the rehiring and other significant benefits sought in the lawsuit, and were therefore entitled to be deemed prevailing parties against the City. The district court, nonetheless, declined to actually award fees and costs, concluding that the Court of Appeals' reversal of the previous fee award had not indicated that the matter was being remanded, and that this created uncertainty as to the jurisdiction of the district court to enter further orders on the issue of fees.[6]

Petitioners appealed the determination of mootness and the refusal to award fees. The Court of Appeals reversed the determination of mootness, but then ordered the case dismissed, on the grounds that § 703(h) of Title VII immunized the City's layoffs from attack because they were done pursuant to a bona fide seniority system, and it further found that

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[3] The 6/12/87 6th Circuit opinion reversing and remanding on the liability and remedial issues appears in the Appendix at A.-128, and is reported as *NAACP v. DPOA*, 821 F.2d 328 (6th Cir. 1987).

[4] The 6/8/87 Court of Appeals decision reversing the award of fees and costs appears at A.-126, *NAACP v. DPOA*, 819 F.2d 1142 (6th Cir. 1987).

[5] The district court's 6/15/88 opinion on mootness appears at A.-158; *NAACP v. DPOA*, 685 F. Supp. 1004 (E.D. Mich. 1988). On 1/13/88, the district court had denied motions filed by the City defendants for Entry of Judgment, and by the DPOA for summary judgment. *NAACP v. DPOA*, 676 F. Supp. 790 (E.D. Mich. 1988), A.-138.

[6] The 10/11/88 district court remand opinion on the issue of fees appears at A.-165; *NAACP v. DPOA*, 696 F. Supp. 1145 (E.D. Mich. 1988).

the union's conduct was similarly immunized from attack by § 703(h).[7]

On the issue of fees, the Court of Appeals held that, since the relief obtained by the effort of the Plaintiffs had been based on erroneous legal premises, Plaintiffs could not properly be deemed prevailing parties, within the meaning of 42 U.S.C. § 1988.[8]

The questions presented are:

1. Did the courts below erroneously deny prevailing status to Petitioners against the City and DPOA defendants, in light of the prior rulings of this Court and the substantial results directly obtained by the Petitioners under circumstances in which these results were never overturned on appeal or otherwise disturbed?

2. Is the Court of Appeals opinion so at odds with the majority view of the circuits on the permissibility of "catalysts" to be deemed prevailing parties under 42 U.S.C. § 1988 as to warrant the exercise by this Court of its supervisory authority and duty in the face of such a clear split among the circuits?

3. Did the Court of Appeals, in its 9/27/90 opinion on fees, apply a standard tantamount to the "central issue" notion rejected by this Court in *Texas State Teachers Association v. Garland Independent School*

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[7] See, A.-176, the 4/9/90 Court of Appeals opinion on the issue of mootness; *NAACP v. DPOA*, 900 F.2d 903 (6th Cir. 1990). Plaintiffs' Petition for Writ of Certiorari as to the 4/9/90 decision, 90-569, was denied by this Court on 11/26/90, and is the subject of a contemporaneously filed Petition for Rehearing. In the Petition for Rehearing, Plaintiffs argue that not only does the 4/9/90 opinion by the Court of Appeals conflict with the view of the majority of the other Circuits which have faced this issue, and depart from the rulings of this Court, but also argue that the underlying liability and remedial issues need to be before this Court when it grants this Petition for Certiorari, to avoid the kind of problem cited by Justice Kennedy in *Missouri v. Jenkins*, 110 S.Ct. 1651, 109 L. Ed 2d 31 (1990) (Concurring opinion by Justice Kennedy, joined by the Chief Justice and Justices O'Connor and Scalia).

[8] See, A.-200, the 9/27/90 Court of Appeals opinion on fees; *NAACP v. DPOA*, 914 F.2d 1494 (6th Cir. 1990).

District, 489 U.S. 782 (1989), thus warranting this Court's review and reversal?

4. Did the 9/27/90 Court of Appeals Opinion disregard the intent of Congress, as to the fee-shifting statutes, thus warranting this Court's review"?

LIST OF PARTIES

With the exception of the Detroit Branch of the NAACP, all parties with an interest in this matter are fully contained on the cover page.

The Detroit Branch of the NAACP is the biggest one of nearly 2,000 subsidiary units of the National Association for the Advancement of Colored People, a New York Corporation, with current headquarters at 4805 Mt. Hope Dr., Baltimore, MD 21215, (301) 486-9191. The NAACP, a membership organization, seeks to confront and combat racial discrimination in all areas of American life, including in law enforcement.

The Guardians, Inc. is a Michigan Corporation, with a membership of Black Police Officers, drawn primarily, but not exclusively, from the City of Detroit's Police Department. Its aims are to advance the interests of blacks and other non-whites in the law enforcement field, including to confront racial discrimination, segregation and prejudice where viewed as impediments to equal opportunity for black officers.

The 10 individual Petitioners were all Detroit police officers and members of the Guardians at the time of trial below.

The named Plaintiffs-Petitioners are the representatives for a certified class which consists of black uniformed police officers in the City of Detroit who were laid off in either 1979 or 1980 from their employment with the Detroit Police Department.

. . . . . .

Thomas I. Atkins, Esq.
Counsel of Record for Petitioners

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INTRODUCTORY PRAYER

Now come the Petitioners to respectfully request that this Court grant the Petition for a Writ of Certiorari to the 9/27/90 Opinion of the Court of Appeals for the Sixth Circuit, so that Petitioners will be permitted to discuss the rulings below which apply erroneous legal standards, ignore the intent of the Congress, conflict with decisions of other circuits and ignore or distort the rulings of this Court.

Respectfully submitted,

.....
Thomas I. Atkins

CITATIONS TO OPINIONS BELOW

The opinions below which are implicated in this Petition are:

1. *NAACP v. DPOA*, 525 F. Supp. 1215 (E.D. Mich. 1981);
2. *NAACP v. DPOA*, 1/25/82 Slip Opinion (E.D. Mich. 1982)
3. *NAACP v. DPOA*, 11/28/83 Slip Opinion (E.D. Mich. 1983)
4. *NAACP v. DPOA*, 12/1/83 Slip Opinion (E.D. Mich. 1983)
5. *NAACP v. DPOA*, 2/24/84 Slip Opinion (E.D. Mich. 1984)
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12. *NAACP v. DPOA*, 821 F.2d 328 (6th Cir. 1987)

13. *NAACP v. DPOA*, 900 F.2d 903 (6th Cir. 1990)

14. *NAACP v. DPOA*, 914 F.2d 1494 (6th Cir. 1990)

JURISDICTION

The judgment of the Court of Appeals for the Sixth Circuit was rendered on September 27, 1990. *NAACP v. DPOA*, 914 F.2d 1494 (6th Cir. 1990). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1)

CONSTITUTIONAL AND STATUTORY PROVISIONS

1. The *Equal Protection Clause of the Fourteenth Amendment* is the only constitutional provision directly implicated in this Petition.

Statutory provisions implicated are:

2. *42 U.S.C. § 1981*, the 1866 Civil rights Act:

> "All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other." Rev. Stat. @ 1977.

3. *42 U.S.C. § 1983*, the 1871 Civil Rights Act:

> "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured

in an action at law, suit in equity, or other proper proceeding for redress."

4. The Civil Rights Act of 1964, *42 U.S.C. § 2000e et seq.*, particularly 703(h), which provides protection for bona fide seniority systems from suit under Title VII.

Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2(a), provides;

"(a) It shall be an unlawful employment practice for an employer—

"(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or

"(2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin."

§ 703(h) of the Civil Rights Act of 1964, as set forth in 42 U.S.C. § 2000e-2(h) states, in pertinent part:

"Notwithstanding any other provision of this subchapter, it shall not be an unlawful employment practice for an employer to apply different standards of compensation, or different terms, conditions, or privileges of employment pursuant to a bona fide seniority or merit system, or a system which measures earnings by quantity or quality of production or to employees who work in different locations, provided that such differences are not the result of an intention to discriminate because of race, color, religion, sex, or national origin."

STATEMENT OF THE CASE

On 9/27/90, the Court of Appeals for the Sixth Circuit entered the opinion which gave rise to this Petition for Writ of Certiorari. A.-200; *NAACP v. DPOA*, 914 F.2d 1494 (6th Cir. 1990). Specifically, the Court of Appeals rejected findings of fact entered by the district court for the Eastern District of Michigan which held Plaintiffs-Petitioners[1] to have "prevailed" against the City of Detroit defendants, as the "catalysts" whose efforts in prosecuting this lawsuit had resulted in forcing the City to rehire the nearly 800 black police officers who made up the certified class.

Even though, for reasons set forth below, Petitioners believe the district court erred in other respects, we will argue that this Court should enter its Writ granting this Petition for Certiorari, because the Court of Appeals fee opinion disregards relevant holdings of this Court on the meaning of "prevailing status" under the fee-shifting statutes; ignores the expressed intent of the Congress; raises the "catalyst" issue on which this Court has yet to rule directly; is at odds with other Courts of Appeals on the "catalyst" issue; and involves numerous errors of law and fact.

Procedural Posture of The Proceedings Below

In beginning his opinion for the Court in *U.S. v. Paradise*, 480 U.S. 149, 154 (1987), Justice Brennan used words which apply to the issues contained in this Petition:

> "Because the Department's prior employment practices and conduct during this lawsuit bear directly on the constitutionality of any race-conscious remedy imposed upon it, we must relate the tortuous course of this litigation in some detail."

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[1] Petitioners are a certified class of nearly 800 Black Detroit police officers who were laid off in reversed seniority order from their jobs in 1979 and 1980.

1. The 1979 Adjudication of 14th Amendment Violations Against the City of Detroit and Its Police Department

In *Baker v. Detroit*, 483 F. Supp. 930 (E.D. Mich. 1979), the district court found that the City of Detroit and its Police Department had engaged in intentional, systemwide, and historic racial discrimination in recruiting, employing and deploying its police officers, in violation of the Equal Protection Clause of the 14th Amendment to the United States Constitution. Specifically, the district court found that, but for the intentional racially discriminatory hiring and recruitment policies, no less than 46.6% of the Detroit Police Department would have been Black in 1979, compared with an actual black workforce of only 39%.

2. The 1979-1980 Layoffs

Alleging budgetary shortfalls, the City laid off 1100 police officers in two waves, the first in 1979 and the second in 1980. At least 800 of the 1100 laid off police officers were black, as a result of the application of the seniority provisions of the collective bargaining agreement between the City and the Detroit Police Officers' Association. As a direct result of the 1979 and 1980 layoffs, Black representation in the Police Department was reduced from 39% to 26%.

3. Plaintiffs-Petitioners' Pre-Trial Relief

Prior to trial, Plaintiffs succeeded in obtaining several measures of significant relief:

a. On 11/17/81, the district court granted Plaintiffs' motion for Partial Summary Judgment, holding that principles of collateral estoppel precluded the City of Detroit and the other City Defendants from relitigating the issue of the City's prior intentional racial discrimination in the recruitment, employment and deployment of police officers to the Detroit Police Department, and that this intentional discrimination was violative of the 14th Amendment to the United States Constitution; A.-1

b. On 1/25/82, the district court entered its Order, pursuant to the 11/17/81 Partial Summary Judgment Opinion, "that consistent with this Court's Opinion dated November 17, 1981, the Plaintiffs' Motion for Partial Summary Judgment is granted to the extent the doctrine of collateral estoppel precludes a relitigation of the issue of the City of Detroit's past intentional discrimination as found in *Baker v. City of Detroit*, 483 F. Supp. 930 (E.D. Mich. 1979)"; A.-14

c. On 11/28/83, the district court granted Plaintiffs' Motion for a Temporary Restraining Order Regarding Recall Rights, enjoining the City defendants "from allowing the recall rights of any class member to lapse"; A.-16

d. On 12/1/83, pursuant to a stipulation between the parties, the district court entered an Order amending the 11/28/83 Temporary Restraining Order, extending the injunction against lapsing of recall rights to *all* laid off officers, both Black and non-Black; A.-19

e. On 2/24/84, the district court granted Plaintiffs' motion for Partial Summary Judgment and Declaratory Judgment, holding:

> "1. That based upon the findings of intentional discrimination in *Baker v. City of Detroit* [citations omitted] the City had a constitutionally-imposed continuing affirmative obligation not only to stop the discrimination, but to remedy all the effects of that discrimination.
>
> "2. That the City had not yet remedied the effects of this prior discrimination when in 1979 and 1980 it reduced black representation of the police force.
>
> "3. That by these layoffs, which the City knew full well would reduce the black representation in the police force, the City breached its affirmative obligation to the Plaintiffs, in violation of their rights under the Fourteenth Amendment."

A.-21

4. The 1984 Liability Findings Against the City

After the 1984 trial on this lawsuit, the district court found that, at the time of the layoffs, the defendant City had disregarded and abandoned its known and unmet Fourteenth Amendment affirmative duty to remediate prior intentional racial discrimination in the recruitment, employment, and deployment of Detroit police officers. Plaintiffs established that the net effect of the 1979 and 1980 layoffs was, therefore, to create a police force at the time of the 1984 trial on this lawsuit which was more at variance with the available work force than had been the case when the district court made its initial 1979 findings of 14th Amendment violation.

Citing this Court's holdings in *Brown v. Bd. of Education*, 347 U.S. 483 (1954) (*Brown I*), 349 U.S. 294 (1955) (*Brown II*); *Green v. New Kent County School Board*, 391 U.S. 430 (1968); *Swann v. Charlotte-Mecklenburg*, 402 U.S. 1 (1971); *Keyes v. School District No. 1*, 413 U.S. 189 (1973); and, *Columbus Bd. v. Penick*, 443 U.S. 449 (1979), the district court held that the City's affirmative obligation to dismantle the dual system of public employment it had deliberately created in violation of the Fourteenth Amendment could not be abandoned simply because of alleged budgetary problems, nor could seniority provisions in a collective bargaining agreement impede these constitutional imperatives.[2] The district court also found the City's conduct violative of 42 U.S.C. § 1983, as alleged by the Plaintiffs.[3]

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[2] The district court said that it "did not accept the City's position advanced in post-trial argument that Title VII law regarding bona fide seniority systems is controlling in constitutional litigation." *NAACP v. DPOA*, 591 F. Supp. 1194, 1203 n.11 (E.D. Mich. 1984); A-23, 41. The district court further said "[U]ntil the U.S. Supreme Court declares otherwise, this Court will not write 'bona fide seniority system' into the U.S. Constitution as the City invites it to do." *Ibid.*

[3] In its 7/25/84 liability and remedy opinion, at A.-49, the district court made the following findings regarding the adverse impact of the unlawful layoffs:

> "Just as significant as the testimony were the exhibits showing the effect of these layoffs on the actual operations of the Detroit

(Footnotes continued on next page)

Rejecting the attempt of the City to evade the remedial obligations because of the fact that they had occurred in the past, the district court found, A.-36, 37:

> "[I]n 1979, when the first of the massive layoffs of black officers involved in this case took place, the constitutional obligation of the City to eliminate continuing effects of past racial discrimination continued to exist.
>
> . . . The City thus breached its affirmative constitutionally mandated duty to remedy past intentional racial discrimination in the Police Department when it began its massive layoffs of black officers in 1979 and 1980, and this breach was knowing and intentional. 'If the actions of school authorities were to any degree motivated by segregative intent and the segregation resulting from those actions continues to exist, the fact of remoteness in time certainly does not make these actions any less "intentional."' *Keyes, supra* 413 U.S. at p. 210-211. . . "

The district court's liability findings against the City defendants was premised, in part, on its holding that the City had admitted in its written pleadings having made the race-

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(Footnotes continued from preceding page)

Police Department. A particularly significant exhibit was Exhibit 645, which shows the racial composition of the Detroit Police Department by sections and precincts. The Special Events Unit, a highly visible unit charged with crowd control during major events, has been reduced from 28 percent black prior to the 1979 layoffs to presently six percent black. Precinct No. 5, which in September 1977 had a population that was 63.1 percent black, today has 18 percent blacks on patrol. Precinct No. 15, a predominantly white precinct, which prior to the layoffs, had 33 percent blacks on patrol, today has four percent blacks. Only six black officers, divided among three shifts, are now assigned to this precinct. This statistic parallels the worst days of segregation in the police department. Finally, Exhibit 645 shows that the Youth Bureau, in a city where 80 percent of the youth is black, is only 13 percent black. Given the importance of black officers as role models for the youth and the importance of preventing youth crime, this statistic is a striking demonstration of the effect of this constitutional violation."

conscious and politically expedient decision to face a lawsuit by Blacks rather than by the more litigious whites.

5. The 1984 Liability Findings Against the DPOA

The Plaintiffs asserted that the defendant Detroit Police Officers Association, (DPOA) the collective bargaining agent for all uniformed Detroit police officers, had violated 42 U.S.C. § 1981 and its Duty of Fair Representation, by permitting invidious racial considerations to affect its decision not to take any steps to avoid the racially discriminatory layoffs. The district court found the DPOA liable for having intentionally violated its Duty of Fair Representation to its Black members:

> "Under the standard first established in *Steele* [*v. Louisville & Nashville R.R. Co.*, 823 U.S. 192 (1944)], elaborated in *Vaca v. Sipes*, [386 U.S. 171 (1967)], and recognized by the Michigan Supreme Court in *Lowe* [*v. Hotel & Restaurant Employees Union*, 389 Mich. 123, 205 N.W. 2d 167 (1973)], and in keeping with the firm policy of the State of Michigan against racial discrimination, this Court finds the DPOA guilty of a breach of its duty of fair representation through its failure to adequately represent the interests of its black members in the layoffs of 1979 and 1980."

Finding that its decision on the Duty of Fair Representation issue made it unnecessary to rule on Plaintiffs' § 1981 claim against the DPOA, the district court made clear that its liability ruling against the DPOA was based on the record as a whole, not solely on the DPOA's failure to take effective action to stop the 1979 and 1980 layoffs.[4]

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[4] "At A.-61, the district court held that

> "The DPOA's breach of the duty of fair representation flows not merely from any reliance upon a seniority system, or a simple refusal to make concessions in the interests of minorities. The DPOA's liability is premised on more than this, and flows inescapably from the following findings:
>
> "1. A history of racial hostility and indifference to the rights and needs of black officers. . . ." (A.-62)

(Footnotes continued on next page)

6. The 1984 Remedial Orders Against the City and DPOA

The district court's remedial order required that the City rehire all laid off police officers still eligible for recall within 180 days, both Black and non-black; ordered that date of hire seniority be retroactively restored; and enjoined further layoffs of black or white officers without prior court approval. *NAACP v. DPOA*, 591 F. Supp. @ 1220-1221; A.-51, 52.

With regard to the DPOA, the district court directed that various changes be made to more greatly assure that union policies and procedures would no longer racially exclude Black officers from full and fair participation on policy-making organs and other union committees. A.-77.

Even though it had rejected City and DPOA arguments that 703(h) of Title VII immunized their conduct surrounding the layoffs, the district court's remedial orders specifically left the seniority system intact, even ordering that the rehiring be in accordance with the seniority provisions of the collective bargaining agreement.

(Footnotes continued from preceding page)

"2. The total absence of black representation in the leadership levels of the union. . . ." (A.-64)

"3. The massive nature of the 1979 layoffs—one quarter of the DPOA membership, one-half of the black membership, a loss of approximately $500,000.00 a year in dues, and the totally perfunctory and passive behavior of the union leadership. . . ." (A.-65)

"4. The present day failure to make any serious efforts to assist these black officers. . . ." (A.-72)

"5. A history of concessions and prompt union action to avert layoffs in 1975 and 1981 when the jobs of white officers were at stake. . . ." (A.-72)

"The actions of the DPOA in 1975 and 1981, when largely white officers would have been involved in layoffs, resulted in concessions to protect jobs. This activity stands in sharp contrast to its action in 1979 and 1980 when the layoffs affected principally black officers." (A.-73)

7. The 1985 Award of Fees and Costs to Petitioners

Finally, the district court found Plaintiffs to be prevailing parties, within the meaning of 42 U.S.C. § 1988, and awarded fees and costs, to be paid by the two defendants.[5]

Specifically, the 10/21/85 district court opinion on fees awarded $429,271.48 in fees and costs: $152,023.60 to lead counsel Thomas I. Atkins; $116,608.00 to co-counsel Jeanne Mirer; $63,175.57 to co-counsel James McGinnis; $52,153.24 to co-counsel Gary Benjamin; and, $3,960.00 to co-counsel Michael Barnhart. Additionally, the court awarded $19,346.23 to fee counsel Ronald Reosti; $6,198.00 to fee counsel Samuel McCargo; $13,360.59 to the NAACP Special Contribution Fund; $1,850.00 to the Guardians Police Organization; and $596.25 to the Detroit Branch of the NAACP.

Finally, the district court denied Plaintiffs' request for reimbursement for additional out-of-pocket costs amounting to more than $40,000.00, monies paid primarily for experts and consultants.

8. The 1987 Appellate Rulings On Liability, Remedy and Fees

On the initial appeals, the Court of Appeals for the Sixth Circuit reversed, vacated and remanded on the liability and remedial issues. As to the City defendants, the Court of Appeals simply ignored the *de novo* findings of constitutional liability made by the district court in 1984, and held that the district court's findings of liability against the City defendant had improperly relied upon the prior findings of constitutional violations in *Baker v. City of Detroit*, 483 F. Supp. 930 (E.D. Mich. 1979); A. 132-134.

As to the DPOA defendants, the Court of Appeals held that, since bargaining over layoffs was not a mandatory subject of collective bargaining, the DPOA could not be held to

[5] A.-79; *NAACP v. DPOA*, 620 F. Supp. 1173 (E.D. Mich. 1985).

violate its Duty of Fair Representation as to a matter over which it had no obligation to bargain in the first place.[6]

On the matter of fees and costs, the Court of Appeals held that, since Plaintiffs' status as prevailing parties had been dependent upon the liability findings now reversed, Plaintiffs' fee entitlements must likewise be reversed. A.-126; *NAACP v. DPOA*, 819 F.2d 1142 (6th Cir. 1987).

9. The 1988 District Court's Remand Rulings

On remand the district court, rejecting motions by the two defendants to dismiss the lawsuit, held that Plaintiffs would ordinarily be entitled to a hearing at which they could attempt to demonstrate that the liability of the two defendants could be based on other than, or more than, the findings in the *Baker* case which had prompted the reversal. A.-138; *NAACP v. DPOA*, 676 F. Supp. 790, 796 (E.D. Mich. 1988).

However, the district court *sua sponte* ordered the parties to brief and argue the question of whether events subsequent to its 1984 liability rulings had made the litigation moot. After receiving the briefings and hearing oral argument, the district court noted that all the police officers originally ordered in 1984 to be rehired had been rehired by the City in the intervening period during which the appeals were prosecuted. Crediting the City's representation that it had no intent to lay these rehired officers off, and noting that the City had even engaged in hiring beyond that required by its 1984 orders, the district court concluded that the matter was now moot as to both defendants, and entered its order dismissing the lawsuit.[7]

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[6] The 6/12/87 Court of Appeals opinion appears at A.-128; *NAACP v. DPOA*, 821 F.2d 328 (6th Cir. 1987). Noting that the district court had not reached Plaintiffs' 42 U.S.C. § 1981 claim against the DPOA, the Court of Appeals left it open for Plaintiffs to prosecute this claim on remand. 821 F.2d @ 333; A.-137.

[7] A.-158; *NAACP v. DPOA*, 685 F. Supp. 1004, 1007 (E.D. Mich 1988). The district court's rationale for dismissing as to the DPOA was that, since Black officers now comprised an absolute majority of the union, they were now capable of protecting themselves through union democracy and no longer needed assistance from the court.

When faced with the Plaintiffs' application for an award of fees, the district court made several findings:

1) Plaintiffs' had served as the catalyst whose efforts had been the direct and proximate cause of the City rehiring which had been initially sought in the lawsuit; 2) Plaintiffs' catalyst role meant that they had prevailed against the City defendants, within the meaning of 42 U.S.C. § 1988; 3) while this finding of prevailing status would ordinarily entitle Plaintiffs to an award of fees and costs against the City, the district court concluded that it was without authority to enter such an order, because the Court of Appeals did not specifically "remand" the fee issue when it entered its reversal; and, 4) Plaintiffs had not prevailed against the DPOA, within the meaning of 42 U.S.C. § 1988.[8]

10. The 1990 Court of Appeals Rulings On Dismissal and Fees

On the second appeals involving the liability and remedial issues, the Court of Appeals entered its 4/9/90 decision, reversing the district court's finding of mootness as to both the City and DPOA defendants.[9]

The Court of Appeals determined, however, that the matter should be dismissed on other grounds, citing the provisions of Title VII, 42 U.S.C. 2000e *et seq*, specifically § 703(h), for the proposition that the City's 1979 and 1980

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[8] A.-165; *NAACP v. DPOA*, 696 F. Supp. 1145 (E.D. Mich. 1988). The district court's conclusion that Plaintiffs had not prevailed against the DPOA was based on its conclusion that the beneficial changes which had admittedly occurred had resulted from the additional City hiring beyond that required by the Court order, and that a majority of those hired had been Black.

[9] A.-176; *NAACP v. DPOA*, 900 F. 2d 903 (6th Cir. 1990). Citing unresolved issues having to do with make whole relief such as restoration of pension rights, back pay, and other out-of-pocket losses, the Court of Appeals held that the controversy could not be properly deemed moot as to the City defendants. (A.-182). As to the DPOA defendants, the Court of Appeals rejected out of hand the district court's notions that "union democracy", combined with the fact that Black officers now constituted a majority of the union's membership, could be deemed capable of mooting the controversy between Plaintiffs and the DPOA. *Ibid*

layoffs were immune from challenge as they were accomplished pursuant to the seniority provisions of the collective bargaining agreement.[10]

On the second appeal involving the fee issues, the Court of Appeals' 9/27/90 opinion reversed the district court's conclusion that the absence of the term "remand" in the previous fee reversal had deprived it of jurisdiction to hear and decide Plaintiffs' fee application. *NAACP v. DPOA*, 914 F.2d 1494 (6th Cir. 1990); A.-200, 201.

Having concluded that the district court had jurisdiction to hear and decide Plaintiffs' application for an award of fees and costs, the Court of Appeals then went on to reject the district court's finding that, even though the case had been dismissed as moot, Plaintiffs were prevailing parties on the grounds that the lawsuit had been the "catalyst" which produced a significant part of the relief initially sought. Specifically, the Sixth Circuit held that, since its 4/9/90 decision had earlier held that § 703(h) of Title VII immunized the City's layoffs from the statutory and constitutional attacks launched by the Plaintiffs, the relief Plaintiffs were credited by the district court with obtaining was premised on erroneous legal conclusions, and these errors prevented Plaintiffs from being properly deemed "prevailing parties". A.-201, 202.

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[10] At A.-193, the Court of Appeals concluded that:

> "Although plaintiffs contend that the protections granted to bona fide seniority systems under § 703(h) apply only to claims brought under Title VII, we decline to read Congress's earlier, more general pronouncements in 1981 and 1983 from the Civil Rights Act of 1870 [sic] to undermine the force of its later specific declarations of civil rights policy regarding bona fide seniority plans in § 703(h) of the Civil Rights Act of 1964. Basic principles of statutory construction dictate this result. . . "

The 4/9/90 decision was the subject of a Petition for Certiorari, and this Court's 11/26/90 denial of Certiorari is the subject of a contemporaneously-filed Petition to Rehear, 90-56[illegible]

The Court of Appeals concluded that since the remedy had been erroneously ordered, the fact that the City defendants had rehired the laid off officers was not legally required. On this reading of the facts and law, the Court of Appeals ruled that the district court had impermissibly credited Plaintiffs' efforts as having been the "catalyst" which produced the rehiring sought by the lawsuit, and that Plaintiffs were not permissibly viewed as prevailing parties on a catalyst theory.[11]

The 9/27/90 fee opinion of the Court of Appeals gives rise to this Petition for Writ of Certiorari.[12]

REASONS FOR GRANTING THE WRIT

Absent special circumstances, prevailing civil rights plaintiffs should be awarded a fair and reasonable attorneys fee, *Hensley v. Eckerhart*, 461 U.S. 424 (1983), and where there has been a "material alteration of the legal relationship of the parties in a manner which Congress sought to promote in the fee statute", plaintiffs have established their entitlement

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[11] The Court of Appeals also held, A.-202

> "Our decision on prevailing party status is limited to the case as a whole on the merits. We do not intend to rule on the question of plaintiffs' right to attorneys fees for any interim injunctive decrees or protective orders maintaining the status quo that were not appealed. Our decision is without prejudice to the rights of plaintiffs to apply for fees under §1988 for the more limited injunctive decrees of November 29, 1983 and December 5, 1983 (recall rights) or other limited injunctive decrees not appealed and reversed. We express no opinion concerning plaintiffs' claim for a limited award of attorneys fees for work leading to these decrees. Nor is our decision denying prevailing party status to plaintiffs on the case as a whole intended to deprive the district court of jurisdiction to entertain requests for attorneys fees for obtaining the more limited decrees referred to above in this paragraph."

[12] Originally due to filed in December, the due date for this Petition was extended to 1/9/91 by the 12/19/90 order of Justice Stevens, attached hereto as an Exhibit.

to an award under 42 U.S.C. 1988.[13] No such special circumstances exist on the record below.

I. THE 9/27/90 RULING IGNORED THE RECORD BELOW

The 9/27/90 Court of Appeals opinion at issue in this Petition held that the district court impermissibly found Plaintiffs to be prevailing parties against the City defendants, in light of the earlier 4/9/90 Court of Appeals dismissal of the underlying case. Reasoning that it was not possible for Plaintiffs to prevail if the theories of their underlying lawsuit were rejected, the Court of Appeals held that:

> "They were not entitled to achieve, and did not achieve, any permanent change in the legal relationship of the parties by virtue of any legal theory presented for review in this Court. The injunctive decrees of the district court were reversed on appeal. Thus, the plaintiffs did not 'cross the statutory threshold' or meet the 'absolute limitation' required for prevailing party status on such theory, claim or decree reviewed on appeal."[14]

By declining to find that Plaintiffs had achieved prevailing status by obtaining the 1983 declaratory judgment and injunction which prevented the lapsing of the recall rights of the laid off officers, the Court of Appeals refused to give effect to several major legal achievements of the Plaintiffs which had

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[13] See, e.g., *Texas State Teachers Assoc. v. Garland Independent School Dist.*, 489 U.S. 782 (1989); ("The touchstone of the prevailing party inquiry must be the material alteration of the legal relationship of the parties in a manner which Congress sought to promote in the fee statute. Where such a change has occurred, the degree of plaintiff's overall success goes to the reasonableness of the award under *Hensley [v. Eckerhart*, 461 U.S. 424 (1983)], not to the availability of a fee award *vel non*."); *Hewitt v. Helms*, 482 U.S. 755, 760 (1987); *Rhodes v. Stewart*, 488 U.S. 1, 3-4 (1988).

[14] But see, *Texas State Teachers Association v. Garland Ind. School District*, 489 U.S. 782 (1989), quoting *Nadeau v. Helgemoe*, 581 F.2d 275, 278-79 (1st Cir. 1978). Also holding that plaintiffs do not have to show their efforts were the *sole cause* for the changes effected by the defendants is *Posada v. Lamb*, 716 F.2d 1066 (5th Cir. 1983).

never been reversed, or even modified, on appeal: 1) Specifically, no appeal was taken from the district court's 11/17/81 (A.-1) and 1/25/82 (A.-14) opinions granting partial summary judgment to Plaintiffs on the impermissibility of relitigating the earlier findings of 14th Amendment violations in *Baker v. City of Detroit, supra*; 2) No appeal was prosecuted from the district court orders of 11/28/83 (A.-16) and 12/1/83 (A.-19) which prevented the City and DPOA from terminating the recall rights of the laid off police officers; 3) No appeal was prosecuted from the 2/24/84 district court order (A.-21) granting partial summary judgment and establishing the obligation of the City defendants to take affirmative action to eliminate the lingering vestiges of the 14th Amendment violations initially found in 1979 in *Baker*, and reaffirmed as a direct result of this lawsuit; 4) No appeal was prosecuted from the 7/25/84 district court order which required that full seniority rights be returned to all the laid off officers. (A.-23, 51-52). It was the effect of this order which both the City and DPOA defendants cited during the 1988 remand proceedings as reasons why no further action was needed to protect the seniority rights of the laid off officers.

The Court of Appeals cited no precedent from this Court which would permit ignoring these legal rulings, all of which now constitute the law of the case, none of which may now be the subject of a timely appeal. Petitioners can find no warrant in this Court's holdings for the fee decisions of the Court of Appeals.

Rejecting the district court's determination that plaintiffs were entitled to be deemed prevailing parties against the City defendants on a "catalyst" theory, the Court of Appeals concluded that

> "Here the plaintiffs have created no similar new legal right. They have attempted to do so, but they have failed in this attempt. Consequently, plaintiffs may not be characterized as 'prevailing parties'. Plaintiffs are not entitled to prevailing party status simply because they have presented an interesting

> argument or a difficult case. They must prevail on some significant claim or legal theory."

By its rulings, the Court of Appeals held that none of the work done by the Plaintiffs to end the 4-5 year layoff of nearly 1000 police officers by the City of Detroit was of legal significance. Relying on its earlier ruling that the layoffs were protected from federal court scrutiny or review by the provisions of § 703(h) of Title VII, 42 U.S.C. 2000 *et seq*, and without holding clearly erroneous the district court's factual finding that Plaintiffs' efforts had been the catalyst producing the benefits sought by the initial lawsuit,[15] the Court of Appeals simply held it irrelevant that Plaintiffs were the reason the City was forced to rescind the job termination of more than 1000 police officers.

But for its erroneous conclusion that the terms of the Sixth Circuit's reversal of the original 1985 fee award precluded its making an award on remand, the district court left little doubt that it would have awarded fees and costs against the City defendants.[16]

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[15] In *United States v. United States Gypsum Co.*, 333 U.S. 364, 395 (1948), this Court has held that

> "[A] finding is 'clearly erroneous' when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed."

Where the district court's findings on the evidence before it is plausible, in light of the record viewed in its entirety, a court of appeals may not reverse it even though convinced that had it been sitting as the trier of fact, it would have weighed the evidence differently. This Court has made clear that, where there are two permissible views of the evidence, the fact finder's choice between them cannot be clearly erroneous. *Anderson v. City of Bessemer City*, 470 U.S. 564, 573 74 (1985). The Court of Appeals ignored the precedents of this Court when it set aside the district court findings on the "catalyst" function served by Plaintiffs' lawsuit.

[16] See, A.-165, 173-174, the 10/11/88 district court remand opinion on fees, where it said:

> "[I]t would appear that Plaintiffs are prevailing parties against the City of Detroit under the catalyst test discussed in *Nadeau, Loudermill*, and *Jago*. The first consideration is whether there is

(Footnotes continued on next page)

Even though the Court of Appeals reversed the district court's finding that it lacked jurisdiction to enter an award of fees,[17] it affirmed the denial of fees on other grounds.

(Footnotes continued from preceding page)

> a causal connection between the lawsuit and the resulting actions by the City. . . .
>
> "The City of Detroit complied fully with this Court's order to return all officers laid off in 1979 and 1980, long prior to the decision of the Court of Appeals reversing and remanding the case. It is clearly through the pursuing of this lawsuit, and the City of Detroit's compliance with this Court's order, that all of the officers who were laid off were reinstated. Clearly, from that point of view, the Plaintiffs were prevailing parties. . . .
>
> "The second step, according to *Jago* and *Nadeau*, is to determine if there is some minimum basis in law for the relief secured. . . . Here, while this Court's January 1988 opinion did not make explicit findings of liability, it did recognize evidence that would suggest a finding of liability—at least enough to allow the Plaintiffs to continue with the cause of action after remand. This meets the tests under *Jago* and *Nadeau* in that Plaintiffs' claims are not 'frivolous, unreasonable, or groundless' and provide at least a minimum basis in law for the relief requested.
>
> "Therefore, this Court finds Plaintiffs to be 'prevailing parties' against the City of Detroit."

Notwithstanding these findings, the district court, at A.-175, said that

> "It therefore appears clear to this Court that the reversal is the law of the case, and that, absent action by the Court of Appeals, this Court cannot award fees. The reversal without remand leaves this Court with no jurisdiction to take any action in awarding fees to the Plaintiffs, even though the Court is of the opinion at this time that the Plaintiffs are prevailing parties against the City of Detroit."

[17] At A.-201, *NAACP v. DPOA*, 914 F.2d 1494 (6th Cir. 1990), the Court of Appeals said

> "We therefore also reversed the district court's previous decision on attorneys fees in light of our disposition of the merits, although we did not intend our decision to preclude the exercise of jurisdiction over future applications for attorneys fees. The district court's decision that it lacked jurisdiction therefore misconstrued our decision."

II. THE 9/27/90 OPINION CONFLICTS WITH THE VIEWS OF OTHER CIRCUITS

The district court's 10/11/88 opinion found that Plaintiffs were compensable "catalysts" under the standards set forth by a number of the Courts of Appeals. See *NAACP v. DPOA*, 696 F. Supp. 1145, 154-56, discussing *Nadeau v. Helgemoe*, 581 F.2d 275 (1st Cir. 1978).

For instance, in *Guglietti v. Sec. of HHS*, 900 F.2d 397 (1st Cir. 1990), the First Circuit said that

> "To be regarded as a catalyst, a suit need not be the sole cause of the fee-target's actions, but it must be a competent producing cause of those actions in at least some measurable, significant degree."

The Third Circuit, in *Clark v. Township of Falls*, 890 F.2d 625 (3d. Cir. 1989), held that

> "Parties are considered to be prevailing when they have succeeded on 'any significant issue in the litigation which achieve[d] some of the benefit the parties sought in bringing suit.' " [citations omitted]).

Addressing the same issue, the Fifth Circuit, *Heath v. Brown*, 858 F.2d 1092 (5th Cir. 1988), said

> "We have noted that 'clues to the provocative effects of the plaintiffs' legal efforts are often best gleaned from the chronology of events: defendants, on the whole, are usually rather reluctant to concede that the litigation prompted them to mend their ways.' ... We are convinced that the district court made a reasonable inference based upon the total record."

The Eighth Circuit, *DeGidio v. Pung*, 1990 U.S. App. LEXIS 20917 (8th Cir. 1990), recently held that

> "Although DeGidio did not obtain the injunctive relief sought, the district court found ... that this lawsuit was a catalyst that brought about changes in the health care at Stillwater that were required to alleviate violations of the Eighth Amendment.... To be considered a prevailing party and be entitled to attorneys' fees, DeGidio must establish a causal link between this lawsuit and the remedial changes made by Pung. The district court held, as a matter of fact, that DeGidio established this link. The district

court's findings set forth above amply support the conclusion that this lawsuit spurred the remedial changes."

In *Montes v. Thornburgh*, 1990 U.S. App. LEXIS 20055 (9th Cir. 1990), the Ninth Circuit held that

"Here, the case became moot only because of appellees' suit. Appellees were in a 'markedly better position than at the outset of their lawsuit' . . . when the lawsuit became moot; and because the litigation was the 'catalyst that prompted the opposing party to take action', the plaintiffs were prevailing parties . . . [citations omitted]."

The Tenth Circuit, in *Foremaster v. City of St. George*, 882 F.2d 1485 (10th Cir. 1989) held that

"A plaintiff may prevail in the absence of a judicial determination on the merits. . . . In such circumstances, we have adopted the catalyst test to determine prevailing party status for attorneys fees. . ."

In *Dunn v. Florida Bar*, 889 F.2d 1010 (11th Cir. 1989), the Eleventh Circuit said

"We first note, as many circuits have held, that 'a party may prevail and be entitled to attorneys' fees when remedial action by the defendant effectively moots the controversy subsequent to filing of the lawsuit'. . . . ".

The Court of Appeals for the D.C. Circuit, *Public Citizen Health Research Group v. Young*, 909 F.2d 546 (D.C. Cir. 1990), recently held that

"A party need not procure a final judgment on the merits in order to be considered a 'prevailing party' for fee-shifting purposes. It is enough that the lawsuit was a 'causal, necessary, or substantial factor in obtaining the result' plaintiff sought.' . . . "

A review of the underlying cases on which these Courts of Appeals upheld the "catalyst" theory of prevailing status,

makes clear that the 9/27/90 Sixth Circuit opinion stands well apart from majority analysis.[18]

In the absence of guidance from this Court, it is likely that other Courts of Appeals may, as did the Sixth Circuit on 9/27/90, disregard what are clearly "significant" changes in the legal relationship between the litigants and deny prevailing status to parties who perform the "private attorneys general" function envisioned by the Congress when the fee-shifting statutes were enacted.

III. THE DISTRICT COURT CORRECTLY FOUND PLAINTIFFS TO HAVE PREVAILED AGAINST THE DETROIT CITY DEFENDANTS

The district court's 10/11/88 opinion, A.-173, made clear its conclusion that Plaintiffs had prevailed against the City defendants within the meaning of 42 U.S.C. 1988:

> "Applying these standards, it would appear that Plaintiffs are prevailing parties against the City of Detroit under the catalyst test discussed in *Nadeau [v. Helgemoe,* 581 F.2d 275 (1st Cir. 1978], *Loudermill [v. Cleveland Bd. of Educ.,* 844 F. 2d 304 (6th Cir. 1988)], and *[Johnston v] Jago*[,691 F. 2d 283 (6th Cir. 1982)]. The first consideration is whether there is a causal connection between the lawsuit and the resulting actions by the City. On this subject the *Nadeau* Court stated:
>
> > 'We should also note that we consider the chronological sequence of events to be an important, although clearly not definitive factor, in determining whether or not the

[18] The 9/27/90 panel opinion even conflicts with the recent decision of another Sixth Circuit panel, *Perket v. Sec. of HHS,* 905 F.2d 129 (6th Cir. 1990), which held

> "The inevitable victory approach used by the district court in the instant case is analogous to civil rights suits where the plaintiff's case is mooted because of intervening events. In such cases, the mootness of the case is not dispositive of the award of attorney fees under the Civil Rights Attorneys' Fees Act, 42 U.S.C. §1988. . . . We therefore hold that Perket's lawsuit was a catalyst for the restoration of his benefits and that Perket is a prevailing party. . . ."

> defendant can be reasonably inferred to have guided his actions in response to plaintiff's lawsuit. This is particularly true where the evidence relevant to the causes of defendant's behavior is under defendant's control and not easily available to plaintiff.' . . .
> 'Looking at the chronological sequence of events in this case, it is clear that the City acted the way it did because of the lawsuit.' [581 F.2d @ 281].

Turning to the factual record established in the proceedings before it in 1981-1984, the district court held (A.-173, 174) that:

> "The City of Detroit compiled fully with this Court's order to return all officers laid off in 1979 and 1980, long prior to the decision of the Court of Appeals reversing and remanding the case. It is clearly through the pursuing of this lawsuit, and the City of Detroit's compliance with this Court's order, that all of the officers who were laid off were reinstated. Clearly, from that point of view, the Plaintiffs were prevailing parties."

NAACP v. DPOA, 696 F. Supp 1145, 1155-57 (E.D. Mich. 1988).

A review of the record below provides ample support for the district court's finding that Petitioners had prevailed, because each of several elements of the reuslts achieved by the Petitioners significantly altered the legal and pragmatic relationships between the parties.

a. The 11/7/81 and 1/25/82 Pre-Trial Orders

The district court's 1981 and 1982 pre-trial orders eliminated any possibility that the City defendants would be able to evade, through litigation, the fact or impact of the 14th Amendment violations previously found in *Baker, supra.* While the original liability findings in *Baker* had been in the context of permitting *voluntary* affirmative action by the City, the 1981 and 1982 pretrial orders made those liability findings directly applicable to the *hiring and layoff* issues raised by

Petitioners. These orders decisively changed the entire legal landscape of the proceedings below.

b. The 11/28/83 and 12/1/83 Pre-Trial Orders

In 1983, the laid-off members of Plaintiffs' class would have lost their right to recall with seniority intact, but for Plaintiffs' motion, granted by the district court, to extend the recall rights of the laid off police officers. The 1983 pre-trial orders preserved Petitioners' recall and seniority rights from expiring, with the consequence that the City defendants were prevented from forcing the class members to start all over again as new applicants, with the considerable pay reduction that would entail.

In the 1988 hearing on mootness, concerned that the recall rights of the laid off officers had been protected by virtue of orders which were implicated in this Court's reversal, Plaintiffs raised this issue with the district court. Plaintiffs specifically suggested that either an order from the Court or agreement among the parties was required to protect the seniority of these rehired officers from collateral attack which would force them to be viewed and treated as new hires, with the related risks of lower pay, loss of benefits, additional layoffs and/or bumping. Both the City and union defendants represented to the district court that Petitioners' successful efforts at obtaining the 1983 pre-trial relief had, when combined with the operation of Michigan labor law, effected permanent seniority protection for the class members, despite the 1987 reversal of the liability and remedial orders.[19]

The Court of Appeals erroneously dismissed as insignificant this seniority protection.

c. The 2/24/84 Summary Judgment and Declaratory Judgment

When it granted Petitioners' motions and issued its 1981 and 1982 pre-trial orders which applied collateral estoppel principles to prevent the City from relitigating the *fact* of its

[19] See, *NAACP v. DPOA*, 685 F. Supp. 1004, 1007 (E.D. Mich. 1988); A.-163. Also see *NAACP v. DPOA*, 696 F. Supp. 1145 (E.D. Mich. 1988), A.-168.

prior 14th Amendment violations, the district court specifically declined to approve Petitioners' request that it also issue a declaratory judgment that the *impact* of the City's violations had been to create remedial obligations which had not been met at the time of the 1979 and 1980 layoffs.

The 2/24/84 partial summary judgment and declaratory judgment granted to the Petitioners took this precise step, holding (A.-21):

> "1. That based upon the findings of intentional discrimination in *Baker v. City of Detroit* [citations omitted] the City had a constitutionally-imposed continuing affirmative obligation not only to stop the discrimination, but to remedy all the effects of that discrimination.
>
> "2. That the City had not yet remedied the effects of this prior discrimination when in 1979 and 1980 it reduced black representation of the police force.
>
> "3. That by these layoffs, which the City knew full well would reduce the black representation in the police force, the City breached its affirmative obligation to the Plaintiffs, in violation of their rights under the Fourteenth Amendment."

By these rulings, the district court specifically found that the *prior* 14th Amendment violations created a *present duty* on the City defendants to remediate the precise conditions of which the Petitioners complained in their lawsuit, and for which relief was sought. Prior to these rulings, no viable federal court orders had issued forth placing such an affirmative remedial obligation on the City to eliminate the remaining vestiges of its racial discrimination in employment within the Detroit Police Department. The prior findings in *Baker* had held that these violations were sufficient to *permit* the City to undertake affirmative promotional measures for the supervisory ranks, but did not impose any specific remedial *obligations* on the City as to remedying its unconstitutional racial discrimination in recruiting, employment and deployment.

In light of this Court's rulings, it was plain error for the Court of Appeals to conclude that Petitioners had failed to

"achieve. . . any permanent change in the legal relationship of the parties by virtue of any legal theory presented for review in this Court." *NAACP v. DPOA*, 914 F.2d 1494 (6th Cir. 1990); A.-200, 201. This Court has consistently held that, once a finding of constitutional violation has been made, the federal courts are under an obligation to take all necessary steps to eliminate all vestiges of the "condition which offends the Constitution." See, e.g., *Brown v. Bd. of Education*, 347 U.S. 483 (1954); *Green v. New Kent County School Board*, 391 U.S. 430 (1968); *U.S. v. Paradise*, 480 U.S. 149 (1987).

U.S. v. Paradise affirmed district court and 11th Circuit opinions which ordered 1-for-1 Black/white promotions to supervisory ranks in the Alabama State Police until the continuing effects of the prior explicit racial discrimination had been ended, as shown by blacks occupying no less than 25% of the supervisory positions (Corporal, Sgt., Lt., Capt., and Major), assuming interested and qualified blacks were available for promotion.

That case, like the one at bar, not only dealt with the crucial area of public safety, but had also been brought by plaintiffs who alleged violation of the 14th Amendment, and 42 U.S.C. §§ 1981 and 1983. There, as here, the record as adjudicated by the district court and undisturbed on appeal, revealed longstanding, sytemwide, exclusion of blacks for the sole reason of race. There, as here, the federal courts had to step in because the responsible public officials had failed to obey the equal protection commands of the federal Constitution, initially in hiring and promotions, but also in deployment and other terms and conditions of employment. The particular remedy at issue in *Paradise* was the permissibility of the explicitly race-conscious promotion order of the district court, as approved by the 11th Circuit, in the face of the demonstrated unwillingness of the public officials to take all necessary and feasible steps to eradicate the continuing vestiges of their adjudicated discriminatory hiring. The particular remedy at issue in the instant case was the effort of the district court to protect the hard-won hiring gains in Detroit from

being scuttled by racially discriminatory layoffs which resulted from the City's asserted fiscal problems.

Addressing the district court findings, *NAACP v. Allen*, 340 F. Supp. 703, 705-706 (M.D. Ala. 1972), Justice Brennan quoted the district judge's own words:

> "Under such circumstances... the courts have the authority and the duty not only to order an end to discriminatory practices, but also to correct and eliminate the present effects of past discrimination. The racial discrimination in this instance has so permeated the Department['s] employment policies that both mandatory and prohibitory injunctive relief are necessary to end these discriminatory practices and to make some substantial progress toward eliminating their effects."

Among the reasons given by the *Paradise* Court, at p. 170, for approving the temporary race-conscious relief ordered below, was that

> "Finally, in this case, as in *Sheet Metal Workers*, 478 U.S., at 485 (POWELL, J., concurring in part and concurring in judgment), the District Court's enforcement order is 'supported not only by the governmental interest in eradicating [the Department's] discriminatory practices, it is also supported by the societal interest in compliance with the judgments of federal courts.' "[20]

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[20] In Note 18, Justice Brennan stated that

> "Amici, the City of Birmingham, the City of Detroit, the City of Los Angeles, and the District of Columbia, state that the operations of police departments are crippled by the lingering effects of past discrimination. They believe that race-conscious relief in hiring and promotion restores community trust in the fairness of law enforcement and facilitates effective police service by encouraging citizen cooperation." ... *NAACP v. Allen*, 493 F. 2d, at 621 ("This is a police department and the visibility of the Black patrolman in the community is a decided advantage for all segments of the public at a time when racial divisiveness is plaguing law enforcement" (citation omitted))."

(Footnotes continued on next page)

In the instant case, as this Court found in *Paradise*, the district court's remedy was narrowly tailored to accomplish the legitimate purposes of ending both the fact and continuing vestiges of the public discrimination against black police officers. Ignoring the devastating impact of the 1979 and 1980 layoffs on the continuing obligation of the Detroit Police Department to remedy its past racially exclusive hiring was not an option consitutionally available to the district court. As this Court said in *U.S. v. Paradise, supra*, @ pp. 173

> "Thus, adoption of the Department's proposal would have fallen far short of the remedy necessary to eliminate the effects of the Department's past discrimination, would not have ensured adoption of a procedure without adverse impact, and would not have vitiated the effects of the defendant's delay."

In the instant case, as found by this Court in Paradise, p. 174:

> "The conditional or limited nature of the remedial order does not raise doubts about whether the District Court intended to eliminate so far as possible the effects of past delay and discrimination; rather it reveals that the District Court sought to achieve this goal while interfering as little as possible with the rights of nonminority troopers."

The district court's remedial order in the instant case also sought to interfere "as little as possible", by requiring that *all* laid off police officers be rehired, assuming continuing qualification, thus eliminating any issue concerning whether black officers were being protected at the expense of white officers, and also eliminating any legitimate question of whether the district court's order had an adverse impact on seniority rights.

(Footnotes continued from preceding page)

Significantly, the Counsel who represented the City of Detroit, arguing for affirmance in *Paradise*, also represents the City here. There, the City cited the importance of the liability findings; here the City argues that the liability findings were irrelevant.

As this Court noted, *U.S. v. Paradise, supra*, @ p. 181, n.31, once unconstitutional racial discrimination has been adjudicated, it is important that it be eliminated as quickly as feasible:

> "We have previously recognized the importance of expediting elimination of the vestiges of longstanding discrimination. In *United States v. Montgomery County Bd. of Education*, 395 U.S. 225 (1969), we upheld a District Court's imposition of a black-to-white faculty goal against modifications made by the Court of Appeals, saying that the District Court order 'was adopted in the spirit of this Court's opinion in *Green v. County School Board*, [391 U.S. 430, 439 (1968)], in that his plan "promises realistically to work, and promises realistically to work now." The modifications ordered by the panel of the Court of Appeals, while of course not intended to do so, would, we think, take from the order some of its capacity to expedite, by means of specific commands, the day when a completely unified, unitary, nondiscriminatory school system becomes a reality instead of a hope. . . . " (some citations omitted)

IV. BOTH COURTS ERRED AS TO PREVAILING STATUS AGAINST DPOA

The district court found that Plaintiffs did not prevail against the DPOA.[21] "With reference to the DPOA's liability for fees and costs to Plaintiffs, the district court said:

> "With reference to the DPOA, it is clear to this Court that Plaintiffs are not prevailing parties. The change in the racial composition of the DPOA so that minorities make up 51.3 percent of the membership did not come about because of this lawsuit. It came about because the City of Detroit increased recruiting after it recalled the laid-off 1979 and 1980 officers. Many officers were recruited after that date, and 70 percent of them were minority officers. This

[21] While Petitioners believe that the District Court erred by failing to find prevailing status against the DPOA, we also believe, and argued below, that 42 U.S.C. 1988 permits us to recover all reasonable fees and costs against the City alone.

> is what changed the racial composition of the DPOA, and not the ruling of this Court. Therefore, this Court finds that, as to the DPOA, plaintiffs are not prevailing parties."

NAACP v. DPOA, 696 F. Supp. 1145, 1157

Because of the manner in which it disposed of the entire question of prevailing status, the Court of Appeals did not specifically address the district court's legal reasoning on the issue of prevailing status against the DPOA, and left intact the lower court findings. Were this Court to issue its Writ and permit Certiorari, Plaintiffs would argue and demonstrate that the district court's determination as to the DPOA was clearly erroneous, and that the failure of the Court of Appeals to reverse this determination was further error.

The Court's initial liability decision made several significant and relevant findings: 1) that the DPOA did not adequately represent its black members in the 1979 and 1980 layoffs;[22] 2) that the DPOA had a history of hostility towards blacks; 3) that the DPOA had a history in which *no* black had ever held a leadership position as of the time of the liability trial; 4) that the white leadership of the DPOA behaved in a perfunctory and passive manner in the face of the 1979 and 1980 layoffs of a "massive nature"; 5) that the white DPOA leadership had been as active in earlier years when largely white officers were threatened with layoffs as it had been passive when the layoffs would disproportionately impact black officers; and, 6) that the DPOA leadership had failed, or refused to provide assistance to the laid off black officers.[23]

In rejecting the DPOA motion for summary judgment during the 1988 remand proceedings, the district court said:

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[22] (". . . it is impossible to fairly read this Court's findings concerning the DPOA's history and conduct before, during and after the 1979 and 1980 layoffs without concluding that the DPOA was indeed guilty of intentional discrimination. . . . ") *NAACP v. DPOA*, 676 F. Supp. 790, 805 (E.D. Mich. 1988); A.-138, 152.

[23] *NAACP v. DPOA*, 591 F. Supp. 1197 (E.D. Mich. 1984). See, e.g., 591 F. Supp. at 1213, where the District Court said it had found "a history of racial hostility and indifference to the rights and needs of black officers. 'Witness after witness, all black and all police officers or sergeants, testified to the discriminatory manner in which they were treated by the DPOA' ".

> "Furthermore, this Court's findings with respect to the violation of the DFR [duty of fair representation] *were tantamount to a finding of intentional discrimination under 42 U.S.C. 1981 when it awarded attorney fees and costs against the DPOA.*" (emphasis supplied)

NAACP v. DPOA, 676 F. Supp. 790, 807.

The remedial decision, *NAACP v. DPOA*, 591 F. Supp. 1194 (E.D. Mich. 1984) ordered the DPOA to have a reasonable representation of blacks in its leadership ranks within 12 months. Though this remedial order was reversed by the Court of Appeals, *NAACP v. DPOA*, 821 F.2d 328 (6th Cir. 1987), the record below is unrefuted that black officers held more leadership positions *after and as a direct result of* this lawsuit than before it was filed and more fully participate in the union's affairs, thus entitling plaintiffs to be deemed prevailing parties against the DPOA.[24]

As this Court recently held in *Texas State Teachers Assoc. v. Garland Ind. Schl. Dist.*, 103 L. Ed 2d 866 (1989), it is not necessary for Plaintiffs to win on *all* relief sought in

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[24] In its 1988 remand ruling, *NAACP v. DPOA*, 676 F. Supp. 790, A.-153, the district court ruled that

> "... the Court found a total absence of black representation at the leadership levels of the DPOA. As of the time of this Court's opinion in 1984, no black had ever been elected to one of the top officer position, only two blacks had served on the executive board, and no black member had ever served on the negotiating committee. This Court specifically rejected the DPOA's reason for not putting blacks on this committee, namely that there were not sufficient 'trustworthy' blacks to fill the positions using the union's criteria of political patronage."
>
> Similarly, in 1988 when the mootness decision was rendered, *two black officers sat on the Negotiating Committee*, something no black officer had ever achieved by the time of the 1984 liability decision. In 1984, at the time of the liability opinion, only 5.7% of the DPOA's committee assignments were made up of black officers. In 1988, at the time of the mootness proceeding below, that number had nearly quintupled to 25.2%. Today, as a direct result of the increased black numbers forged by Plaintiffs' efforts, one of those four positions is now held by a black officer.

order to be properly deemed prevailing, so long as they succeeded on achieving *significant* relief sought through the lawsuit. The District Court considered the black majority in the DPOA to be sufficiently significant that it saw no need for further judicial protection. It necessarily follows that, since no such majority would have existed but for the recall forced by this lawsuit, Plaintiffs' efforts played a *significant* role in bringing about this result.

Against the backdrop of these changes in the relationship between the black members of the class and the DPOA, and this Court's ruling in *Texas State, op. cit.*, it was plain error for the courts below to have denied Plaintiffs prevailing status against the DPOA.

V. THE COURT OF APPEALS OPINION IGNORES CONGRESSIONAL INTENT

The legislative history of 42 U.S.C. 1988 includes the following pertinent language:

> "The purpose and effect of [the Fees Act] are simple—it is designed to allow courts to provide the familiar remedy of reasonable counsel fees to prevailing parties in suits to enforce the civil rights acts which Congress has passed since 1866.... All of these civil rights laws depend heavily upon private enforcement, and fee awards have proved an essential remedy if private citizens are to have a meaningful opportunity to vindicate the important Congressional policies which these laws contain.
>
> "In many cases arising under our civil rights laws, the citizen who must sue to enforce the law has little or no money with which to hire a lawyer. If private citizens are to be able to assert their civil rights, and if those who violate the nation's fundamental laws are not to proceed with impunity, then citizens must have the opportunity to recover what it costs them to vindicate these rights in court.
>
> "The remedy of attorneys fees has always been recognized as particularly appropriate in the civil rights area, and civil rights and attorneys fees have always been closely interwoven. In the civil rights area, Congress has instructed the courts to use the

broadest and most effective remedies available to achieve the goals of our civil rights laws."[25]

The Congress also recognized that "parties may be considered to have prevailed when they vindicate rights through a consent judgment or without formally obtaining relief." S. Rep. No. 94-1011 at 5, 94th Cong. 2d Sess., reprinted in (1976) U.S. Code Cong. & Admin. News at 5912. Also see, *Texas State, supra*; *Hewitt, supra*, at 760-761; *Maher v. Gagne*, 448 U.S. 122, 129 (1980).

Neither the DPOA nor the City should now be permitted to reap the windfall which would result if they are immunized from having to pay the "private attorneys general" identified by Congress in 42 U.S.C. 1988 as so crucial to achieving the nation's commitment to equal rights under the law. The Congress fully recognized that those most likely to be the targets and victims of federal civil rights violations would also usually be least able to mount the effective challenges to those violations. This is why the Congress has instructed the courts to use "*the broadest and most effective remedies available* to achieve the goals of our civil rights laws." (emphasis added).

CONCLUSION

For all the foregoing reasons, Plaintiffs-Petitioners urge that this Court grant this Petition and enter its Writ of Certiorari.

Respectfully submitted,

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[25] *Senate Report No. 94-1011*, 94th Cong., 2d Session, @ pp. 2-3 (1976).

Supreme Court of the United States

No. A-476

NAACP, Detroit Branch, et al.,

Petitioners

v.

Detroit Police Officers Association, et al.

O R D E R

UPON CONSIDERATION of the application of counsel for the petitioner,

IT IS ORDERED that the time for filing a petition for a writ of certiorari in the above-entitled case, be and the same is hereby, extended to and including January 9, 1991.

/s/John Paul Stevens

Associate Justice of the Supreme Court of the United States

Dated this 19th day of December, 1990.